NOTES.

A NEW ERA IN STATE INHERITANCE TAXES.—The question of the limitation of the state taxing power, as applied to decedents' estates, has of recent years grown enormously in importance, legislatures having found this a fertile field for obtaining revenue. The tendency has been steadily toward wider use of the power, until the Supreme Court of the United States, in *Frick v. Commonwealth of Pennsylvania*,[1] intervened to set a limit which the state may not transcend.

That a state cannot tax the transfer of real propery in another jurisdiction, belonging to one dying domiciled within the taxing state, appears to be generally conceded, so that the point has seldom been adjudicated.[2] On the other hand, all states have asserted the right to tax intangible personalty of residents, although the evidence thereof is located in another jurisdiction, on the familiar doctrine of *mobilia sequuntur personam*,[3] and this power has been conceded to them by the Supreme Court of the United States.[4]

The chief difficulty arises where, as in *Frick v. Pennsylvania*,[5] a state undertakes to levy a tax based upon the total value of the estate, including tangible personalty located elsewhere. The assumption of such power was formerly justified on the same reasoning as that employed in the case of intangible property, but it is coming to be realized that this is at best only a fiction, over which the facts of the case must prevail.[6] To meet this difficulty other grounds have been suggested, the most important of which were employed by the Supreme Court of Pennsylvania in its opinion.[7]

The first is that, notwithstanding the fact that the property is located elsewhere, the transfer is accomplished by the laws of the domiciliary state, which thereby gains jurisdiction to tax such transfer.

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[1] 45 Sup. Ct. 603 (1925), holding unconstitutional the Pennsylvania inheritance tax law, Act of 1919, P. L. 521, Pa. St. 1920, Sec. 20465, 20498, in so far as it was construed to include in the valuation of an estate for taxation tangible personal property located outside of Pennsylvania.

[2] Connell v. Crosby, 210 Ill. 380, 71 N. E. 350 (1904); Ann. Cas. 1915A 169, note. See *In re* Swift, 137 N. Y. 77, 32 N. E. 1096 (1893); Vanuxem's Estate, 212 Pa. 315, 61 Atl. 876 (1905). Westfeldt's Succession, 122 La. 836, 48 So. 281 (1909); Bittinger's Estate, 129 Pa. 338, 18 Atl. 132 (1889).

[3] People v. Union Trust Co., Ill. 168, 99 N. E. 377 (1912); Frothingham v. Shaw, 175 Mass. 59, 55 N. E. 623 (1889); State v. Probate Court, 124 Minn. 508, 145 N. W. 390 (1914); Mann v. Carter, 74 N. H. 345, 68 Atl. 130 (1907); Lines' Estate, 155 Pa. 378, 26 Atl. 728 (1893).

[4] Bullen v. Wisconsin, 240 U. S. 625 (1916).

[5] *Supra*, note 1.

[6] Buck v. Beach, 206 U. S. 392 (1907); Cooley, Taxation (8th ed.), Sec. 440, 451. See Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 22 (1890).

[7] Frick's Estate, 277 Pa. 243, 121 Atl. 35 (1923). It should be kept in mind in the following discussion that when, as here, the tax is upon the succession and not specific legacies, the domicile of the beneficiaries is unimportant, as no jurisdiction can be gained thereby.

To sustain this position, the State Court points out that such property descends according to the law of Pennsylvania, both "by the statutes of those states (where the property was located) . . ., and in the undisturbed comity existing between the states." [8] Granting the truth of this statement, it remains to be shown how the jurisdiction to tax this transfer has been gained. The aid of the courts of Pennsylvania has not been invoked to accomplish the transfer, and its laws have aided that transfer only as they have been adopted by the state of the *situs*, and not by any virtue inherent in them, since the state where the property is located might as well have adopted by statute a scheme of distribution identical with that of the state of domicile. The mere fact that it has adopted those laws as such is not important, and, even if it so desired, the former state could not confer upon the latter the jurisdiction to tax this transfer. In other words, the state of domicile could not of itself prevent the transfer [9] and therefore has not the power to impose the burden of a tax upon it.

The second ground relied upon was that, granting the inability of the state of domicile to tax the transfer occurring in another state, it may, as a condition of permitting the transfer of property within its jurisdiction, which it undeniably has the right to prevent, require the payment of a tax measured by the value of the whole estate, wherever situated. At first sight, this appears correct, but brief consideration will show its fallacy. If the amount of tax is so determined, a greater tax will be assessed against one estate than against another of equal amount, so far as the property passing within the taxing jurisdiction is concerned, though passing to the same class, which may easily be construed as a deprivation of the equal protection of the laws guaranteed by the Constitution, Fourteenth Amendment, Section 1. Nor can this position be defended on the ground of classification, for such a classification would be unreasonable, and subject, moreover, to the objection which may be raised to this ground of defense of the tax in general—that it is a mere subterfuge, seeking to do indirectly what the state is without constitutional authority to do directly.[10] It may be said in this connection that the United States Supreme Court seems impressed with the idea that, while this tax was in form one upon the transfer of the property, the intention and practical effect was to divert to the state a portion of the estate so passing, seizing upon the part within the control of the state to accomplish that purpose.

The position of the State Court in this matter is somewhat inconsistent, since the statute under which the tax was assessed plainly

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[8] *Ibid.*, p. 261, 121 Atl. 42.

[9] Blackstone v. Miller, 188 U. S. 189 (1903); Mager v. Grima, 8 How. 490 (U. S., 1850).

[10] See Western Union Telegraph Co. v. Foster, 247 U. S. 105, 114 (1918); opinion of Mr. Justice Holmes, dissenting, in Maxwell v. Bugbee, 250 U. S. 525, 543 (1919); Frick v. Commonwealth of Pennsylvania, *supra*, note 1, p. 606.

required the inclusion of real as well as personal property beyond the jurisdiction in determining the value of the estate,[11] which the Court failed to do.[12] If it were true that any conditions which the State wished might be imposed upon the transfer of the property within the jurisdiction, this realty should be included also, in obedience to the express terms of the statute.[13]

It seems unquestionable, therefore, that the decision in *Frick v. Pennsylvania* [14] is correct, but a number of interesting problems, both legal and practical, are raised by the case. The first is suggested by a comparison of the case with that of *Maxwell v. Bugbee*,[15] in which the New Jersey inheritance tax act,[16] providing for a tax, the rate of which was to be determined by the total value of the estate, wherever situated, although it was to be calculated only upon that part within the state, was upheld. While the difference in amount of tax did not, in that case, bear so direct a relation to the amount of property located outside of the state as it did in *Frick v. Pennsylvania*,[17] the cases seem indistinguishable in principle, and there can be little doubt of a real change of attitude within the brief period intervening.[18]

The case of *Frick v. Pennsylvania* [19] appears to indicate a growing tendency on the part of the Federal Supreme Court to limit the scope of inheritance taxation by the states as closely as it has already done in the case of direct taxation upon the residents of a state [20]— to real property and tangible personal property located within the state, and intangible personalty without regard to the location of the evidence thereof.[21] The result of this limitation is in effect to re-

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[11] *Supra*, note 1, Sec. 1, 45; Pa. St. 1920, Sec. 20465, 20498.

[12] Frick's Estate, *supra*, note 6, pp. 249, 250.

[13] It should be said that for the purposes of the foregoing discussion the statute *supra*, note 1, is not changed by the present Act of 1925, P. L. 717, which is considered later in another connection.

[14] *Supra*, note 1.

[15] 250 U. S. 525 (1919).

[16] N. J., Laws 1914, p. 267.

[17] *Supra*, note 1.

[18] It is worthy of note that the decision in Maxwell v. Bugbee, *supra*, note 15, was by five justices, with four dissenting, and that most of the majority of the Court there have since left the bench. This fact may serve to explain the two decisions, occurring as they do within six years of each other. It is interesting also to note that as indicated *supra*, note 10, the reasoning of the dissenting opinion in the earlier case is precisely that employed in the later one, even to the citation of identical cases. The slight extent to which the inclusion of property in other states influenced the amount of the tax assessed in the earlier case may have been responsible for a decision which the Court refused to follow when, in the later case, the logical result of that decision was squarely brought to its attention.

[19] *Supra*, note 1.

[20] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905).

[21] The Court intimates that there is after all much similarity between direct and inheritance taxation; see p. 605, and note the extensive use of cases, in

quire that property of a decedent subject to the taxing authority of one jurisdiction be exempt from taxation in all others, with the exception of intangible personalty of a nonresident, the tangible evidence of which is within the taxing state.[22] Whether consciously or not, the Court has by this decision taken a long stride in the direction of solution of a situation which was rapidly becoming unbearable.

Possibly a more accurate way of expressing the rule, would be to say that the *situs* of the property, whether real or personal, and whether tangible or intangible, is absolutely controlling in the determination of taxability in the jurisdiction seeking to impose that burden. The difference is, however, that whereas real property has a *situs* which can never be changed, and tangible personalty *prima facie* acquires a *situs* in whatever jurisdiction it is located (subject to proof that it is merely passing through or for some other reason has not acquired such a *situs*), intangible personal property cannot be said definitely to be located anywhere, being no more than a credit or claim against another, and therefore remains subject to the fiction of *mobilia sequuntur personam*, which at the time of its origin was, and in some senses still is, a true statement of the situation.

Whether under the theory just advanced or under statutory provisions like those referred to above, or judicial determination such as that of the Supreme Court in *Frick v. Pennsylvania*,[23] a large field of double taxation of inheritance is done away with. The principal class left subject to such taxation is that of intangible personalty, when the evidence thereof or the person against whom the claim is to be asserted is in a jurisdiction other than that of the domicile of the decedent.

Fortunately, a remedy has been found for the last situation as well and is now being applied. Within the past year, a number of states, including Pennsylvania, have enacted laws on this subject more or less similar, the important provision in which, for our purposes, is that granting to nonresidents exemption from taxation on personal property of any kind located within the jurisdiction, provided that the state of domicile imposes no death tax upon such property of residents of the first state or has a reciprocal statute.[24]

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which direct taxation was concerned, as authority for the decision. See also *In re* Swift, *supra*, note 2; State v. Probate Court, *supra*, note 3, p. 513, 145 N. W. 393. For the same distinction as is made here with relation to inheritance taxation, in the field of direct taxation, compare Kirtland v. Hotchkiss, 100 U. S. 491 (1879); Bonaparte v. Appeal Tax Court, 104 U. S. 592 (1881), with Union Refrigerator Transit Co. v. Kentucky, *supra*, note 20; Fidelity Trust Co. v. Louisville, 245 U. S. 54 (1917).

[22] This exception is subject to some limitation; see the following paragraph.

[23] *Supra*, note 1.

[24] Conn. Laws 1925, c. 239; Mass. Laws 1925, c. 338 (not yet effective); N. Y. Laws 1925, Art. 174; Pa. Laws 1925, 717. Similar provisions have been adopted or are before the legislatures in other states.

The only unfortunate aspect of this praiseworthy attempt to solve the difficult problem presented is that the Supreme Court has as we have seen, declared [25] that a state may not tax the estate of a resident upon tangible personalty located elsewhere, so that this class of property when located in a state other than that of domicile will, under the statutes referred to, escape taxation altogether.

The problem of double taxation by state and national governments is of course not solved by any of these considerations, and has in fact not yet been brought under judicial control. The double jurisdiction thus established in the matter of taxation is a characteristic of our dual fundamental structure of government, and probably must, as such, be accepted in the same way as the double control exercised in other fields, though peculiar to the United States.

H. C. R.

STATE CONTROL OF EDUCATION.—"The child is not the mere creature of the state," the Supreme Court of the United States has just announced; and in so saying it has widened again the already extensive boundaries of the constitutional conception of the term "liberty" as used in the Fourteenth Amendment to the Constitution of the United States. The opportunity came in the recent decision on the constitutionality of the Oregon School Law.[1] The court has decided that an act compelling the attendance of children up to the age of sixteen at public schools only is a deprivation of liberty without due process of law.[2]

It would seem that when a court addresses itself to the interpretation of the due process clause,[3] it is confronted with two problems. The first is what is due process; the second is what is this life, liberty or property of which the person may be deprived, rightly if there be due process, wrongly if there be not due process. It is not always necessary to consider both questions, for to one or the other the answer may be obvious. In the present case, the question of due process [4] is thus approached—by what right can the State Legislature seek

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[25] In Frick v. Pennsylvania, *supra*, note 1.

[1] Pierce v. Society of the Sisters, 45 Sup. Ct. 571 (U. S., 1925).

[2] The Act (Ore., Laws 1923, p. 9) requires parents and guardians to send children from eight to sixteen years of age to public schools, and failure or refusal to do so is made a misdemeanor. The present cases did not, however, arise out of prosecutions under the act, but were suits in equity brought by the schools to enjoin the enforcement of the act.

[3] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." Constitution, Fourteenth Amendment.

[4] The courts have not attempted to make a final definition of due process. It may be manifested in a variety of ways, as by proper procedure in the legislature, generality of the laws, notice and hearing; but none of these is involved here. It depends in this case on the police power and its proper use.

to regulate and in this case practically abolish private schools? It would seem to admit of no contradiction that the state has the right, under its police power, to superintend and regulate the education of its people.[5] If the exercise of this police power be reasonable, then due process is had. But if the enactment is without legitimate reason,[6] then due process is lacking. Apparently no argument was advanced that there was any reason at all, much less a legitimate one, why private schools should in effect be abolished.[7] Probably none could fairly be urged. As the court points out, it was not shown that private schools had failed in their duty to the state, or that their existence threatened destruction to American institutions. Causes less grave than these would probably not be sufficiently reasonable to permit of total abolition; any lesser shortcomings could be overcome by the admitted right to regulate. In short, what is a reasonable and legitimate exercise of the police power depends entirely on the circumstances, the importance of which, in turn, is judged by the courts on the basis not only of legal precedent, but of its political philosophy.

The same method is to be found in the construction of "life, liberty or property." Thus liberty is held in the present case to include the rights of parent or guardian to control the education and raising of the child, always of course under the reasonable supervision and regulation of the state. "The child is not the mere creature of the state." Conceivably the time might come when the political philosophy of this would be denied by everybody, as it is now denied by a comparative few. Yet without doubt Mr. Justice McReynolds' succinct summary is an accurate reflection of the present political philosophy of the overwhelming majority of the American people. Moreover, this construction of "liberty" was expectable as a legal proposition, on the authority of *Meyer v. Nebraska*.[8] In that decision it was held that liberty included the right to acquire an education in the usual branches of learning. The definition of liberty in the present case is undoubtedly a legitimate extension of that proposition. Hence, either as a question of present political philosophy, above which a court can

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[5] In Meyer v. Nebraska, 262 U. S. 390 (1923), this was assumed without discussion. The object of the police power, in its broader sense, has been said to be the right "to prescribe regulations to promote the health, peace, morals, education and good order of the people." Barbier v. Connolly, 113 U. S. 27, 31 (1884). General legislative power might perhaps be a better term; but whatever it be called, the power has no definite limits. Chief Justice Taney has said: "they (police powers) are nothing more or less than the powers of government inherent in every sovereignity to the extent of its dominions." License Cases, 5 How. 504, 583 (U. S., 1847).

[6] Usually expressed as reasonable relation to some purpose within the competency of the State.

[7] The law was a direct enactment by referendum. It is said that its passage was secured by the influence of a revived secret society having peculiar and perhaps fanatical religious and racial opinions.

[8] *Supra*, note 5.

scarcely rise, or as a legal matter, the decision of the present case seems sound.

There is, however, one technical objection. There may well be some doubt whether the present case really turns on the construction of the term "liberty." For the party to the suit is not a parent or guardian prosecuted for violation of the law. Two schools are seeking to enjoin the enforcement of the law. But corporations may not lay claim to the "liberty" of the Fourteenth Amendment.[9] The court recognizes this, but pointing out that corporations may demand that they be not deprived of property without due process of law, it successfully demonstrates how the act violates this right.[10]

Deprivation of property without due process of law would then seem to be the real basis of the decision. True, the law is none the less unconstitutional, but it would seem that there has been no authoritative construction of liberty. However, when it is remembered that Mr. Justice McReynolds' discussion of liberty consisted of more than a few passing illustrative remarks and that it is supported by legal authority and American political philosophy, it is clear that it would not lightly be disregarded, and that actually, if not technically, there has been an important construction of the meaning of liberty, and that should the opportunity come again, the Supreme Court would repeat, "the child is not the mere creature of the state."

H. L. R.

CONTRIBUTORY NEGLIGENCE OF CHILDREN.—In a case recently decided in Wisconsin,[1] the plaintiff, who was a girl slightly less than seven years of age, was suing to recover for injuries received when she was struck by an automobile driven by the defendant. The trial court left to the jury the question of whether the plaintiff had been guilty of contributory negligence, with an instruction that the plaintiff was not bound to exercise the degree of care which would be required of an adult, but was bound to exercise such care as would be exercised by other children of the same age, intelligence and experience. Upon the finding of the jury, judgment was entered for the defendant, and the plaintiff appealed, assigning as error the action of the trial court in submitting to the jury the question of contributory negligence in view of the fact that the plaintiff had not reached the age of seven. The Supreme Court of Wisconsin held that the question was properly left to the jury, and, since the instruction given properly distinguished between the degrees of care required of adults and of children, no error was committed.

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[9] Western Turf Association v. Greenberg, 204 U. S. 359 (1907).

[10] It was shown that patronage decreased, with consequent reduction of income; and that in time the profitable features of the business would be destroyed.

[1] Schmidt v. Riess, 186 Wis. 587, 203 N. W. 362 (1925).

The question of the responsibility of a child of tender years for personal,[2] contributory negligence is one which has led to many conflicting decisions, and which, in spite of broad dicta found in many of the opinions, has not been definitely answered in many states. It is now universally accepted that a child is not held to the same degree of care as an adult, and, although the expressions employed have differed in detail, the courts generally adopt the same principle.[3] The conduct of an adult is measured by the degree of care which would be exercised by ordinarily prudent persons in the same or similar circumstances. The acts of a child are tested by the individual capacity of the child himself. The standard applied to adults is objective, taking no account of individual differences. That used in the case of children is subjective, depending entirely upon the individual capacity of the child. So far there is no serious difference of opinion. It is when we come to the question of whether the law of contributory negligence, adopting the subjective standard in the case of children, should be applied in any case where the plaintiff is a very young child that we approach the center of the controversy.

In an Iowa case [4] the court has said that the defense of contributory negligence is based more upon considerations of public policy, which require that every one should guard his person against injury [5] than upon what is just to the defendant, and that a rule founded upon such considerations can have no application in the case of an infant who has not reached the age of discretion. The problem which ever continues to engage the attention of the courts is when an infant has reached this age of discretion. The courts which have considered the question have approached it from two different points of view.

The method adopted by some courts in dealing with the problem is to regard it as a matter of law, and, consequently, to be decided by the court. In a case decided by the Supreme Court of Pennsylvania,[6] Paxson, *J.*, speaking for the court, said that the question of the age at which an infant's responsibility for negligence must be presumed to commence could not be answered by referring it to the jury, since that would result in a shifting standard, affected by the sympathies or

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[2] The doctrine of imputed negligence is not discussed in this note. See SHEARMAN AND REDFIELD, NEGLIGENCE (6th ed.), Secs. 74-84.

[3] Government St. Ry. v. Hanlon, 53 Ala. 70 (1875) (same age and discretion); McMahon v. Northern Cent. Ry., 39 Md. 438 (1873) (same age and intelligence, or intellectual capacity). In Rhodes v. Georgia R. and Bkg. Co., 84 Ga. 320, 324, 10 S. E. 922, 923 (1889), the Court says that the test of capacity is the ability to distinguish between good and evil. There is language to the same effect in Hamilton v. Morgan's Co., 42 La. Ann. 824, 831, 8 So. 586, 587 (1890).

[4] Walter v. C. R. I. & P. R. Co., 41 Iowa 71, 75 (1875).

[5] For a discussion of the principles upon which the defense of contributory negligence is founded, see Prof. F. H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV., 233.

[6] Nagle v. Allegheny Valley R. R., 88 Pa. 35, 39 (1875).

prejudices of the jury in each particular case. It was not a question of fact for the jury, but one of law for the court. He goes on to say that the rights, duties and responsibilities of infants are clearly defined by the law, and cites Blackstone [7] as authority for the proposition that fourteen is the age of discretion in males, and twelve in females, and that at such an age an infant may choose a guardian and contract a lawful marriage. The age at which an infant is responsible to the criminal law is also settled. Below the age of seven he is incapable of forming a criminal intent. Between the ages of seven and fourteen there is a rebuttable presumption of incapacity. After fourteen an infant is presumed to be responsible. Applying this analogy to the particular case, the court held that the plaintiff, who was over fourteen and who had produced no evidence of incapacity, was precluded from recovering by his own negligence.

The other method of dealing with the problem is to treat it as a matter of fact, and to leave it to the jury under proper instructions. This does not mean that the court is powerless to direct a finding that the plaintiff is incapable of negligence. It is well within the discretion of the court in such cases, as in all cases where only one reasonable inference of fact can be drawn from the evidence, to direct such a finding. On the same principle binding instructions for the defendant have been held proper.[8] This power should, however, be exercised only with extreme care.[9]

It is generally said that the weight of authority is with the first method stated above, which is sometimes referred to as the Illinois rule.[10] The reasons given for its adoption are not uniform. Some states, such as Illinois, Pennsylvania and South Carolina, frankly adopt the analogy of the criminal law. The rule is sometimes based upon the proposition that an infant below the age of seven is in fact incapable of negligence, and will for this reason be held incapable as a matter of law.

It is somewhat difficult to enumerate the jurisdictions which have adopted the second method of dealing with the question because of the fact that the issue is seldom clearly presented. The courts state the proposition in affirming judgments in cases where the trial

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[7] 1 BLACKSTONE, COMMENTARIES, *436, 464.

[8] Kyle v. Boston Elevated Ry., 215 Mass. 260, 102 N. E. 310 (1913).

[9] McMahon v. Northern Cent. Ry., *supra*, note 3.

[10] It has been adopted in the following jurisdictions: Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N. E. 997 (1902). Upon the facts of this case, it was not necessary for the court to adopt the rule as it was broadly stated, but in the case of the Ill. Cent. R. R. v. Jernigan, 198 Ill. 297, 65 N. E. 88 (1902), the Court accepted the statement of the rule and relied upon it as authority for its decision. Reichle v. P. R. T. Co., 241 Pa. 1, 88 Atl. 79 (1913); Government St. Ry. v. Hanlon, *supra*, note 3; Newport v. Lewis, 155 Ky. 832, 160 S. W. 507 (1913); Dodd v. Spartanburg Ry. Co., 95 S. C. 9, 78 S. E. 525 (1913); Am. Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563 (1906): Gunn v. Ohio River Ry., 42 W. Va. 676, 26 S. E. 416 (1896).

court refuses binding instructions for the defendant,[11] or in refusing to interfere with a finding of the jury.[12] Occasionally the rule is stated in reversing a judgment for the defendant upon a verdict found under binding instructions.[13] The issue has been squarely presented in Minnesota,[14] and the rule has been definitely adopted. It is certainly the law in Massachusetts, where the court has found no error in binding instructions for the defendant.[15]

It is submitted that the decisions in many states which refer to a "conclusive presumption of incapacity," but which do not in terms accept the analogy of the criminal law, or which do not accept the same arbitrary limits, are not in conflict with the second method above. It is practically impossible to find cases, in jurisdictions other than those mentioned above, which actually apply this conclusive presumption in cases involving children above the age of five.[16] As it appears above, this may well be within the discretion of the trial judge to control obviously unreasonable conclusions of fact, and is, consequently, not inconsistent with the second method. Many of these cases can be explained on the ground that the facts disclosed by the evidence did not justify a finding of negligence on the part of the child.[17] For this reason it is believed that the statement that the weight of authority is with the first method should be received with caution.

Upon principle, the first method has the advantage of all arbitrary rules. It is simple, and probably results in a just conclusion in most cases. It is, however, subject to the same objections as are other rigid rules of this nature. No rule which makes the plaintiff's right to recover depend upon whether he is a day under, or a day over a certain age can be considered satisfactory. The analogy to the criminal law is not well taken. In the first place the reasons for the rigid rules of the criminal law are to a large extent historical, and have their origin in the reaction from the extreme severity of the criminal law of the times. Not only children, but all classes of defendants were protected by purely artificial technicalities. In the second place, the criminal law deals with felonious intent, which is a very different matter from the capacity of a child to exercise care.[18] Nor is the al-

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[11] Sullivan v. Boston El. Ry., 192 Mass. 37, 78 N. E. 382 (1906).

[12] Ritscher v. O. & P. V. R., 79 N. J. L. 462, 75 Atl. 209 (1910); Edwards v. Chic., etc., Ry., 21 S. D. 504, 110 N. W. 832 (1907).

[13] McMahon v. Northern Cent. Ry., *supra*, note 3.

[14] Hannula v. Duluth, etc., R. R., 130 Minn. 3, 153 N. W. 250 (1915). In Decker v. Itasca Paper Co., 111 Minn. 439, 127 N. W. 183 (1910), the Court had considered the question, but did not decide it.

[15] Kyle v. Boston El. Ry., *supra*, note 8.

[16] See cases in L. R. A. 1917F 43, note 88.

[17] *Ibid.*

[18] For a case criticizing the criminal law analogy, see Johnson's Adm'r v. Rutland R. R., 93 Vt. 132, 139, 106 Atl. 682, 685 (1919).

ternate reason relied upon more valid. To say that a child under the age of seven is in fact incapable of exercising care is as ridiculous as the old custom in one of the English counties which established the age of discretion at the time when an infant was able to count up to twelve pence and to measure an ell of cloth.[19] It is not in fact true.

The chief objection brought against the second method is that it results in a shifting standard.[20] It is submitted that the standard is not shifting, although the application varies in the particular case, as it must when a subjective standard is adopted. It has also been objected that this method leaves infant plaintiffs at the mercy of the prejudices of juries. But jurors are ordinary men and women, and sympathy for children is a normal human instinct. The many cases in which juries have found in favor of the plaintiffs would seem to bear out this conclusion. Some jurisdictions furnish an additional safeguard in the form of a *prima facie* presumption of incapacity.[21] This, however, seems to be unnecessary in view of the discretion of the court over findings against the evidence, and the fact that the burden of proving contributory negligence is upon the defendant.

It is submitted, in view of these considerations, that the second method of dealing with the responsibility of a child of tender years for contributory negligence is the sounder one. It is in harmony with the accepted principles of the law of negligence, since it requires every child to exercise the degree of care of which he himself is capable.

L. B. C.

ARBITRATION AND AWARD.—The growing popularity of arbitration as a means of settling commercial disputes is not difficult to understand. Business needs are far more adequately met in this way than they could be in law courts congested with suits pending. The quick and informal procedure of the arbitration tribunals of the various trade associations or of the arbitrators appointed specially by the parties to the conflict dispatches in a day matter that would require months of litigation; and the reduction of cost is no less striking. Wesley A. Sturges in a recent number of the *Yale Law Journal*,[1] argues strongly for this mode of settling controversies, and supports his argument with an imposing array of facts and figures; and by way of comparison to the method he advocates, he cites the Willett-Herrick trial.

But the courts do not need to be persuaded. For years they saw the advantages of such a system, without feeling themselves free to

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[19] Y. B. 12 & 13 Edw. III, R. S., 236 (1339).

[20] See Nagle v. Allegheny Valley Ry., *supra*, note 6.

[21] For a discussion of the various presumptions applied by the courts, see the exhaustive note in L. R. A. 1917F 11.

[1] "Commercial Arbitration or Court Application of Common Law Rules of Marketing," 34 YALE L. J. 480.

take the necessary step to make it effective. A long series of decisions based on Coke's *dictum* in *Vynior's Case*,[2] established the rule that submissions to arbitration were revocable.[3] In England, notwithstanding this rule, commercial arbitration became an important resort of merchants in the cotton trades in the middle of the nineteenth century, due to the disturbing influence of the Civil War; and other branches of commerce were not slow to follow the example, and to establish tribunals for the arbitration of disputes. At the same time the famous decision of *Scott v. Avery*[4] marked the beginning of a change in the English law on the subject, a change which at the end of fifty years resulted in the full recognition of the validity of contracts to arbitrate. And there has been no indication of any desire to return to the former rule, but, on the contrary, a vast and ever-increasing quantity of cases are brought before arbitrators.[5] In the United States the law has not shown the same growth, in spite of decisions indicative of an attempt to keep pace with the English development,[6] and in spite of the almost unanimous opinion among judges that the existing law was an anomaly. But statutes have been passed in two states, and it seems likely that within a short time there will be a general response to the nation-wide movement to put commercial arbitration on a practical and effective basis.

New York was the first state to modernize its laws in this respect. The statute[7] provides that agreements to submit to arbitration any disputes that may arise between the parties as a result of certain contracts or transactions between them shall be binding and enforceable at law. The parties may choose any bureau of arbitration that is at their disposal, or they may name their own arbitrators. If no arbitrator is named in the agreement to arbitrate the court will appoint one. It makes no difference how the parties arrange the matter; but once they have come to an agreement the courts will enforce it as they would any contract. An award must be made, and the courts will enforce it, or set it aside on proof of fraud, or other misconduct. Only when a question of fact arises as to the making of the agreement or its terms is the court called upon to perform its usual functions. The arbitrators are given power to call witnesses and to give a final judgment, and a majority of the arbitrators is empowerd to make a valid award, unless the agreement provides otherwise. This statute made arbitration a dependable method of settling com-

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[2] 8 Coke 80 (Eng., 1609).

[3] See Julius H. Cohen, "Commercial Arbitration and the Law." Mr. Cohen has found that Coke misstated the law on the subject and that submissions to arbitration up to his time had not been revocable.

[4] 5 H. L. Cas 811 (Eng., 1856).

[5] See 69 Sol. J., 251.

[6] Delaware and Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250 (1872).

[7] N. Y. Laws, 1920, c. 275.

mercial disputes, for it prevented the last minute revocation of the submission of a case to arbitrators, a practice too frequently indulged in by parties who saw that they were about to lose the award. In 1923, New Jersey passed a statute[8] modeled on that of New York. And in February, 1925, the "United States Arbitration Law" passed both houses of Congress and was signed by the President. This law, which goes into effect on January 1, 1926, is very like the New York and New Jersey laws, with a limitation in its application to cases involving sums over $3000—a limitation for which there seems no very good reason. Massachusetts is considering the same law. And now the American Bar Association, which drafted the Federal bill, proposes a model for uniform state arbitration laws,[9] to be more or less like the other statutes that have been adopted, but differing in this, that the agreement to arbitrate future disputes is to remain revocable and only the submission of the actual case is made irrevocable. For it is thought that in the interior states, where there is less pressure of foreign business, the need for keeping these agreements will not be so great as in the coast states.

These statutes all leave the impression of a very strong desire on the part of the legislatures to encourage arbitration and to give it an opportunity to be even more useful than it has been in the past. And the courts in interpreting them have added their weight to this sentiment. The decision in the *American Eagle Ins. Co. v. New Jersey Ins. Co.*,[10] a recent New York case, is noteworthy as a difficult problem settled most wisely according to the spirit of the statute and the needs of the time. The arbitration agreement provided that there should be three arbitrators, and that if one of them should resign another was to be appointed to take his place. A dispute arose and the case was submitted to the arbitrators, who heard all the evidence on both sides. Then, on the day when the award was to be made, one of them resigned. The other two continued to sit and made the award without him. This was, of course, a majority award and, on the face of it, binding, according to the law. But the question was whether it was valid inasmuch as the parties had agreed that a substitute should be appointed; and also it was not settled whether the award could be final since only a majority of the arbiters had deliberated during the making of it. And there can be no doubt that a dissenting third person may frequently influence the other two and possibly win one of them over to his side. But the court took the view, as to the first of these questions, that the parties could not have intended that proceedings should be halted at the last moment, and a rehearing of all the allegations and proofs necessitated by the resignation of one of the arbitrators, though such would be a literal interpretation of the language of the agreement. And, furthermore, that

[8] N. J. Laws, 1923, c. 134.
[9] 11 Am. Bar. Asso. J., 153.
[10] 240 N. Y. 398, 148 N. E. 562 (1925).

the arbitration agreement and the Civil Practice Act should be read in harmony where harmony is possible. As to the second question, the court took the position that there had been time for sufficient deliberation during the hearings, and that to permit one of three arbitrators when he saw that he was to be outvoted to end the whole arbitration by quickly resigning would endanger the effectiveness of the statute and return arbitration to the unsatisfactory state in which it had been for so many years. Consequently the award was held to be valid.

This decision, though it goes further, is in harmony with those that preceded it.[11] Even the case of *Bullard v. Grace* [12] is decided in quite the same spirit. One of the arbitrators and one of the parties to the dispute withdrew from the proceedings before the final submission. Of course, the award made under these circumstances was invalid. But the court in declaring it so clearly supported a liberal view of the statute. It is the defaulting party who breaks his promise to arbitrate, the party who has most to gain by delay and technicality. And the courts, recognizing this, have guarded against it in their decisions.

O. J. W.

LIABILITY OF AN AUTOMOBILE DRIVER FOR INJURIES SUSTAINED BY OCCUPANTS OF THE CAR.—The question of what acts of an automobile driver render him liable for injuries to passengers in his car is one of great practical importance to every motorist. It is, however, a question to which the courts have not given a uniform answer. There are four different views as to the extent of the driver's liability, depending on upon which of several precedents and analogies the particular court happens to base its conclusion.

Perhaps the most striking view of the subject is that adopted by the Supreme Court of New Jersey in *Rose v. Squires*.[1] In that case the plaintiffs were severely injured when the defendant's car, in which they were passengers, collided with another car and skidded into a tree. The court held that while a duty of reasonable care is owed by the driver to guests whom he has invited to ride with him, those who are in the car by their own solicitation can recover only for injuries due to acts wilfully injurious. The law with regard to guests at sufferance so laid down is peculiar to New Jersey.[2] It is based on the case of *Lutvin v. Dopkus*,[3] where plaintiff, who had asked de-

[11] Kelley *et al.* v. Bauer *et al.*, 240 N. Y. 74, 147 N. E. 363 (1925); S. A. Wenger Co. v. Propper Silk Mills, 239 N. Y. 199, 146 N. E. 203 (1924); Davis v. Rochester Can Co., 124 Misc. Rep. 123, 207 N. Y. Supp. 33 (1924).

[12] 210 App. Div. 476, 206 N. Y. Supp. 335 (1924).

[1] 128 Atl. 880 (N. J., 1925).

[2] See, to the same effect, Crider v. The Yolande Coal Co., 206 Ala. 71, 89 So. 285 (1921).

[3] 94 N. J. L. 64, 108 Atl. 862 (1920).

fendant to drive him to a picnic to which both were invited, was denied recovery for injuries sustained as the result of defendant's careless driving. The latter case relies on an analogy to earlier real property cases, in which it was held that a licensee can recover only for injuries sustained by reason of the land owner's wilfully injurious acts. It bases the distinction between invitees and licensees, not on the ground of the purpose of the plaintiff's presence in the defendant's car, but on the question of whether the plaintiff was invited to ride or merely permitted to do so. Both this latter definition and the former rule in regard to licensees on real property have been repudiated by most courts.[4] The application of such discarded theories to automobile cases would therefore seem to be unsound.

Massachusetts has adopted a different view of the subject. In *Marcinowski v. Sanders*[5] the Supreme Judicial Court held that there is no distinction between invitees and licensees. Both classes can recover only for gross negligence on the part of the driver. The case relies on *Massaletti v. Fitzroy*,[6] where the reason for the rule is given in the analogy between the duty owed by a gratuitous bailee of personal property to that owed by the driver of an automobile to his gratuitous guest. Since in Massachusetts the former is liable only for gross negligence, it is held that the latter should also be liable only for gross negligence. It is pointed out, however, that what is gross negligence in the one case is not necessarily so in the other, for the degree of care required in dealing with human life is greater than that required for personal property. It will be noted that no distinction is made between invited guests and guests at sufferance. The driver of an automobile will be liable to both if he is guilty of gross negligence. The distinction between ordinary negligence and gross negligence cannot be treated fully here. It will suffice to say in passing that the court in *Marcinowski v. Sanders, supra,* defines the term as meaning "a greater culpability than lack of due care respecting the rights of others." This Massachusetts view has been adopted in Georgia.[7]

Pennsylvania, starting from the same source, namely, the analogy to the law of gratuitous bailment, has arrived at a somewhat different conclusion. In *Cody v. Venzie*,[8] it was held that the degree of care required by the driver or bailee varied with the purpose for which the passenger or goods were transported and *Massaletti v. Fitzroy, supra,* was cited with approval. The law, however, was held to be that if the carriage is for the sole benefit of the driver, the driver is liable only for gross neglect; if the carriage is for the sole benefit of the passenger, the driver is responsible for slight neglect; and if it is

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[4] See Francis H. Bohlen, Duty of a landlord toward those entering his premises of their own right, 69 U. OF P. L. REV., 142, 245 *et seq.*

[5] 147 N. E. 274 (Mass., 1925).

[6] 228 Mass. 487, 118 N. E. 168 (1917).

[7] Harris v. Reid, 30 Ga. App. 187, 117 S. E. 256 (1923).

[8] 263 Pa. 541, 107 Atl. 383 (1919).

for the benefit or pleasure of both, the driver is responsible for ordinary neglect. This decision was subsequently followed in *Ferrell v. Solski.*[9] The proposition adopted by both the Massachusetts and the Pennsylvania decisions is open to two objections. In the first place it is almost impossible as a practical matter to distinguish between the various degrees of negligence. In the second place the analogy between gratuitous bailment of personal property and the gratuitous transportation of a passenger in an automobile does not hold. The degree of protection afforded to property rights is not necessarily the same as that given to human life.

A recent Indiana case, *Munson v. Rupker,*[10] represents the majority view on the subject. Plaintiff was injured when the car which defendant was driving at the rate of forty miles an hour went off the highway into a ravine. The lower court instructed the jury that if they found that plaintiff was present in the car at his own solicitation, he could recover only for acts wilfully injurious. The resulting verdict and judgment for the defendant was reversed on appeal. After an able and exhaustive review of the authorities the court comes to the conclusion that, irrespective of whether the plaintiff was an invited guest or a guest at sufferance, he is owed a duty of reasonable care by the driver. The law so laid down is in accord with the weight of authority.[11]

It is submitted that the view of the subject taken by the Indiana court in *Munson v. Rupker, supra,* is the correct one. The New Jersey view errs both in relying on an analogy to real property cases, which is more apparent than real and in adopting a discarded view of the real property situation to which it refers. The Massachusetts and Pennsylvania views are of doubtful value, both because they distinguish between various degrees of negligence and because of their confusing analogy to cases dealing with gratuitous bailees. As was well said by the court in *Munson v. Rupker, supra:*

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[9] 278 Pa. 567, 123 Atl. 493 (1924).

[10] 148 N. E. 169 (Ind., 1925).

[11] The following cases have adopted the Indiana view as to invitees. Karavias v. Gallinocos, 143 Law Times Journal 237, 1917 Weekly Notes, 323 (1917); Perkins v. Galloway, 194 Ala. 265, 69 So. 875 (1915); Galloway v. Perkins, 198 Ala. 658, 73 So. 956 (1917); Spring v. McCabe, 53 Cal. App. 330, 200 Pac. 41 (1921); Masten v. Cousins, 216 Ill App. 268 (1919); Mayberry v. Sivey, 18 Kan. 291 (1877); Beard v. Klusmeier, 158 Ky. 153, 164 S. W. 319 (1914); Avery v. Thompson, 117 Me. 120, 103 Atl. 4 (1918); Fitzjarell v. Boyd, 123 Md. 497, 91 Atl. 547 (1914); Bauer v. Griess, 105 Neb. 381, 181 N. W. 156 (1920); McKenzie v. Oakley, 94 N. J. L. 66, 108 Atl. 771 (1920); Cates v. Hall, 171 N. C. 360, 88 S. E. 524 (1916); Tennessee C. R. Co. v. Van Hoy, 143 Tenn. 312, 226 S. W. 225 (1920).

The following cases have adopted the Indiana view as to guests at sufferance: Rappaport v. Stockdale, 199 N. W. 513 (Minn., 1924); Siegrist v. Arnot, 10 Mo. App. 197 (1881); LaRose v. Shaugnessy Ice Co., 197 App. Div. 82, 189 N. Y. Supp. 562 (1921); Grabau v. Pudwell, 45 N. D. 423, 178 N. W. 124 (1920); Christie v. Mitchell, 93 W. Va. 200, 116 S. E. 715 (1923).

"It seems to us that the only sensible and humane rule is that an owner and driver of an automobile owes a guest at sufferance the duty of using reasonable care so as not to injure him. The rule as to trespassers and licensees upon real estate, with all its niceties and distinctions, is not to be applied to one riding in an automobile at the invitation of, or with the knowledge and tacit consent of, the owner and operator of the automobile. A trespasser and licensee going upon a tract of land—an inert, immovable body—takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion and hurl it through space in a manner that may mean death to him who enters thereon. He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them. But, when the owner of the automobile starts it in motion, he, as it were, takes the life of his guest into his keeping, and in the operation of such car he must use reasonable care not to injure any one riding therein with his knowledge and consent. It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood. The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a guest at sufferance as well as to a guest by invitation."

Jos. S. C., Jr.

AGREEMENTS TO BRING SUIT IN A PARTICULAR COURT EXCLUSIVELY.—Agreements in which the parties have attempted to confer exclusive jurisdiction upon a particular court have met with little success in this country. In the recent case of *Sudbury v. Ambi Verwaltung, etc.*,[1] such an attempt was held to be invalid, and the court in so holding is in accord with a great majority of the cases in which agreements of this nature have been involved. In the *Sudbury Case, supra,* a resident of the State of New York had entered into a contract with a German corporation. One of the clauses of the contract provided that, in the event of a dispute upon the contract, only German law should apply, and the dispute should be settled in the German courts. The plaintiff, a resident of New York, brought suit in a New York court, and the German corporation appeared by attorney, and moved that the complaint be dismissed since the plaintiff had bound himself to sue only in a German court. It was held, however, that the agreement was an attempt to oust jurisdiction from American courts, and was therefore void as against public policy.

This is unquestionably in accord with the Federal rule which was laid down in *Insurance Co. v. Morse*,[2] and which has been followed

[1] 210 N. Y. Supp. 164 (1925).

[2] 87 U. S. 445 (1874).

ever since by the Federal courts.[3] In the Massachusetts case of *Nute v. Hamilton Mut. Ins. Co.*[4] it was decided that such agreements are invalid, and this rule is the law in Illinois [5] and probably in Pennsylvania,[6] although the question has never been presented to the Supreme Court of the last-named state. In New York there is what at first sight appears to be a split of authority upon this point. As Judge Dowling intimated in his opinion in the *Sudbury Case*,[7] the question has never been raised in the Court of Appeals in New York State. In the Appellate Division of the Supreme Court, however, the question of these agreements to restrict jurisdiction to a particular court has been the subject of several decisions.

In *Greve v. Aetna Live Stock Ins. Co.*,[8] there was an agreement that all disputes on an insurance policy should be settled in a particular county court. The jurisdiction of the dispute was thus ousted from every other court of original jurisdiction in the state. The court in that case held the agreement to be good, and binding upon the parties. It is believed that this decision is flatly opposed to the general rule. In the opinion the court stated that there were no decisions on the subject in New York, and went on to say, "The question has received some attention in other jurisdictions, and without exception the decisions either directly sustain or tend to support the position taken by the court at special term," [9] *i. e*, that the agreement of the parties determines the place of the trial of the action. A number of cases are then mentioned as supporting this view. Among these is the case of *Guaranty and Safe Deposit Co. v. Green Cove Springs*.[10] In this case there was a provision in a mortgage which stipulated that the mode of sale described in the mortgage should be exclusive of all others. The court held this agreement invalid as an attempt to oust the jurisdiction of the courts. Obviously this case is not directly in point, but the theory of it, if given any relevancy, must be interpreted as contrary to the position taken by the court which decided *Greve v. Aetna Live Stock Ins. Co., supra*. That court cited several other cases in support of the view taken by it. Among these are *Nute v. Hamilton Ins. Co.* and *Ins. Co. v. Morse*, both already referred to. By no stretch of the imagination can these cases be considered to support the position taken by the court. In *Nute v. Hamilton Ins. Co., supra*, one of the provisions of an insurance policy stipulated that any suit on the

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[3] Doyle v. Continental Ins. Co., 94 U. S. 535 (1876); Mut. Life Ass'n v. Cleveland Mills, 82 Fed. 508 (1897); Gough v. Hamburg, etc., Gesellschaft, 158 Fed. 174 (1907).

[4] 6 Gray 174 (Mass., 1856).

[5] Blair v. National Shirt Co., 137 Ill. App. 413 (1907).

[6] Healy v. Eastern Building & Loan Association, 17 Pa. Super. 385 (1901).

[7] *Supra*, note 1, p. 167.

[8] 30 N. Y. Supp. 668 (1894).

[9] *Ibid.*, p. 669.

[10] 139 U. S. 137 (1890).

policy should be brought in the county where the insurance company was established. It was held that the agreement was invalid as being contrary to public policy, and that suit might be brought in any other county of the state. In *Insurance Co. v. Morse, supra,* agreements of insurance companies not to remove any suits, which might arise, from the state to the federal courts (assuming that the federal courts had jurisdiction but for the agreement) were held to be invalid as an attempted invasion of constitutional prerogative. Thus, both of these cases which are cited as supporting the rule of *Greve v. Aetna Live Stock Ins. Co., supra,* are flatly opposed to it, and leading cases for the proposition that agreements to restrict jurisdiction of a given subject-matter to a particular court are invalid. The court in *Greve v. Aetna Live Stock Ins. Co., supra,* cites also, as supporting the view taken by it, several cases,[11] all in fact contra and holding that agreements of this nature are invalid. Thus the case of *Greve v. Aetna Live Stock Ins. Co., supra,* must be repudiated as being contrary to the great burden of authority, and a departure from the rule which even at that time was quite generally accepted.

The case of *Gitler v. The Russian Co.*[12] represents an attempt to narrow the operation of the general rule as laid down in *Ins. Co. v. Morse, supra,* and to confine its application to those agreements which relate to all future controversies as opposed to agreements relating to a particular pending controversy. In *Gitler v. The Russian Co., supra,* the parties agreed after a judgment had been obtained that the action which might be brought to satisfy the judgment would be brought in the Russian courts. The plaintiff, contrary to the terms of the agreement, sued in a New York court, and the court in deciding for the defendant upheld the agreement. Judge Scott said in his opinion, "It is thus made clear that the Supreme Court in deciding *Ins. Co. v. Morse,* which is recognized as a leading authority in this country had clearly in mind the distinction between an agreement not to submit to the courts a particular pending controversy and an agreement to withdraw from the jurisdiction of the courts all future controversies that might arise respecting the relative rights of the contracting parties, and that its decision was limited to the latter class of agreements."[13] There is some authority for this position. In *Townsend v. Masterson, etc., Stone Dressing Co.,*[14] it was held that an agreement not to resort to the Court of Appeals in an appealable case is valid. So in *Hong Kong and Banking Corp. v. Cooper*[15] it was held that an agreement to limit the scope of judicial inquiry in a

[11] Boynton v. Ins. Co., 4 Metc. 212 (Mass., 1842); Hall v. Ins. Co., 6 Gray 185 (Mass., 1856); Amesbury v. Ins. Co., 6 Gray 596 (Mass., 1856); Crane v. French, 38 Miss. 503 (1860); Reichard v. Ins. Co., 31 Mo. 518 (1862).

[12] 124 App. Div. 273 (1908), 108 N. Y. Supp. 793.

[13] *Ibid.,* p. 795.

[14] 15 N. Y. 587 (1857).

[15] 114 N. Y. 388 (1889).

particular pending action was valid. Where the agreement relates to a particular pending controversy there is thus a tendency to permit the parties to vest the jurisdiction of that dispute in a particular court. Where, however, the agreement seeks to vest jurisdiction of all future controversies in a particular court, the rule in *Greve v. Aetna Live Stock Ins. Co., supra,* has been changed, and the agreements are not enforced. In *McLean v. Tobin,*[16] there was a clause in a fire insurance police binding the insured to bring any action thereon only in the Supreme Court of a specified county. The agreement was held to be a nullity. In *Darling v. Protective Assurance Society of Buffalo,*[17] there was an agreement providing that all actions which might be brought on the policy should be brought in the courts sitting in the city of Buffalo. The court declared the agreement a nullity. It becomes evident that New York has departed from the heterodox rule laid down in *Greve v. Aetna Live Stock Ins. Co., supra,* and that the recent decision of *Sudbury v. Ambi Verwaltung, etc., supra,* is in accord with the weight of authority in that state and in the country generally.

It is interesting to observe that the rule has been followed in an even more recent case with facts very similar to those of the Sudbury case.[18] That the rule is now firmly established in New York seems to have become, thus, incontrovertible.

R. D. G.

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[16] 58 Misc. Rep. 528, 109 N. Y. Supp. 926 (1908).

[17] 71 Misc. Rep. 113, 127 N. Y. Supp. 486 (1911).

[18] Sliosberg v. N. Y. Life Ins. Co., 211 N. Y. Supp. 270 (1925). There was an agreement that all suits on an insurance policy issued in Russia should be brought in the Russian courts. It was held that this agreement did not deprive the New York courts of jurisdiction.